In The

Supreme Court of the United States

October Term, 1976

No. 76-951

PETER SKAFTE,

Appellant,

vs.

CLELA ROREX,

Appellee.

On Appeal from the Supreme Court
of the State of Colorado

MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS

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Court pending

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I.

MOTION TO DISMISS FOR LACK OF JURISDICTION

The appellee hereby moves this Court to dismiss the above-captioned case for lack of jurisdiction because it fails to raise a substantial federal question.

II.

BRIEF IN SUPPORT OF MOTION TO DISMISS

The Questions Presented Are Not Substantial

Whether the Colorado Statute which excludes non-citizens from voting in school elections violates the Equal Protection Clause does not present a substantial federal question.

Appellant asserts that this Court has jurisdiction under Title 28 U. S. C. § 1257 (2) (1970). However, under that statute, the Court lacks jurisdiction if the appellant does not show that the constitutional question presented is a substantial federal question. *Zucht v. King,* 260 U. S. 174, 176 (1922).

The appellant's central contention is that the question of whether a state, consistent with the Equal Protection Clause, may deny a non-citizen the right to vote in local school elections should be considered by the Court.

However, the Court has spoken to the issues sought to be presented by the appellant on a number of occasions, and therefore the question presented is not substantial enough to warrant further consideration by the Court.

It has long been established that a state has the right to regulate access to the franchise in state, and even federal elections. *See, e. g., Dunn v. Blumstein,* 405 U. S. 330 (1972); *Kramer v. Union Free School District,* 395 U. S. 621, 637 (1969); *Lassiter v. Northampton Election Board,* 360 U. S. 45 (1958).

Dealing with a fact situation more closely related to the case at bar the Court has recently applied the Equal Protection Clause to the rights of aliens in *Sugarman v. Dougall,* 413 U. S. 634 (1973). In considering a state's exclusion of aliens from public service and utilizing a "close scrutiny" test, the Court limited its holding in the following language:

> (O)ur scrutiny will not be so demanding where we deal with matters resting firmly within a state's constitutional prerogative. This is no more than a recognition of the state's historical power to exclude aliens from participation in its democratic political institutions. . . . This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.

Sugarman v. Dougall, supra, 413 U. S. at 638. *See, also, Hill v. Stone,* 421 U. S. 289 (1975); *Skafte v. Rorex,* — Colo. —, 553 P. 2d 830 (1976) (a copy of which is appended to appellant's jurisdictional statement at Appendix 5 through 9).

The Court has decided a number of times that until an alien becomes naturalized as a citizen he has outstanding loyalties, and while he may be entitled to equal protection of the laws, he does not have legal parity with a citizen. *See, e. g., Sugarman v. Dougall, supra; Harishades v. Shaughnessy,* 342 U. S. 580 (1952). Therefore, the question raised by the appellant is not a substantial Federal question.

The appellant's argument that the Colorado Statute creates an irrebuttable presumption in violation of the Due

Process Clause is a semantical "red herring". The fact that there is a line of cases dealing with the fundamental right of a parent to have a significant say in family affairs and the affairs of his children does not alter the fact that the cases cited above resolve the issue of whether or not the non citizen has a right to vote. Every election has some impact upon the children of a resident alien. The fact that a local school district election is involved does not alter the fact that school district elections have important governmental consequences. *See, e. g., Kramer v. Union Free School District,* 395 U. S. 621 (1969).

To accept the appellant's argument that the Due Process Clause requires an individualized hearing on his qualifications to vote in any instance where the rights or welfare of his children may be affected would of necessity lead to the conclusion that the appellant is entitled to an individualized hearing on his right to vote in any general governmental election. For example, the appellant would be entitled to vote in elections which involve the expenditure of general governmental funds on education, or in elections which involve expenditures outside the educational area which may result in a reduction of the educational budget, and thus directly affect the appellant's children.

The questions suggested under the irrebuttable presumption analysis do not raise substantial federal questions. The Court has recently acted to narrow the use of that analysis under the due process clause. *See, e. g., Mourning v. Family Publications Service, Inc.,* 411 U. S. 356 (1973). In *Weinberger v. Salfi,* 422 U. S. 749 (1975), the Court considered an irrebuttable presumption argument that social security provisions which required marriage for at least nine months prior to death in order for a widow and child to be entitled to social security death benefits, and considered the difficulty with the irrebuttable presumption analysis when applied outside the narrow areas in which the irrebuttable presumption analysis was originally used. The manner in which the Court distinguished *Vlandis v. Kline,* 412 U. S. 441 (1973) from the facts before it in the *Salfi* case resolves the question raised by the appellant in this case.

The Court stated that, unlike the statute involved in the *Vlandis v. Kline* case, the Social Security Act does not purport to speak in terms of the *bona fides* of the parties to a marriage, but then make plainly relevant evidence of such *bona fides* inadmissible. To the contrary, in the *Salfi* case the Court determined that the legislature imposed certain requirements which it considered to be consistent with underlying policy objectives to be used as a test for eligibility. To establish eligibility for the social security benefits the appellant only had to establish compliance with the nine-month requirement. The statute did not talk about any presumptions or ultimate facts being drawn from the nine-month period, even though there were obviously legislative considerations in setting that nine-month limitation. *See, Weinberger v. Salfi,* 422 U. S. 749, 772.

The Court determined that absent the limitation which it imposed,

> The District Court's extension of the holdings of *Stanley, Vlandis,* and *LaFleur* to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore

been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.

Weinberger v. Salfi, 422 U. S. at 772.

To accept the appellant's argument that citizenship as a requirement for access to the franchise creates an irrebuttable presumption that the appellant is not qualified to vote, and therefore entitles him to an individualized hearing on whether or not he is qualified to vote would be to render the legislative judgment that aliens are not sufficiently interested in the political community to vote a nullity. As stated in the *Salfi* case, such a decision would open the door to use of the irrebuttable presumption analysis to challenge any legislative classification.

The legislative classification based upon alienage is simply another way of stating that aliens who have not become citizens have not demonstrated a commitment to our form of government and continue to have outstanding loyalties. *See, e. g., Harishades v. Shaughnessy,* 342 U. S. 580 (1952); *Sugarman v. Dougall,* 413 U. S. 634 (1973); *c. f., Dunn v. Blumstein,* 405 U. S. 330 (1972). Exclusion of aliens from the franchise does not create any sort of factual presumption entitling the alien to an individualized hearing. *See, Weinberger v. Salfi,* 422 U. S. 749 (1975). There is no better basis for legislative classification and regulation of access to the franchise and there is no alternative to using citizenship as a criterion for testing allegiance and voting qualifications. *C. f., Perkins v. Smith,* 370 F. Supp. 134 (1974), *aff'd mem.,* 426 U. S. 913 (1976).

CONCLUSION

Since the Court has already placed limitations on the use of the irrebuttable presumption analysis, the question raised by the appellant does not inject a substantial Federal question which is otherwise lacking in this appeal. Therefore, we respectfully submit that the Court should dismiss the appeal as not presenting a substantial Federal question.

Respectfully submitted,

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